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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PAUL DIAZ GARZA, Defendant and Appellant.	H031612 (Santa Clara County Super. Ct. No. CC504216)

Defendant Paul Diaz Garza was sentenced to 30 years in prison based on a plea of no contest to four counts of sexually abusing his preadolescent stepdaughter. The trial court accepted his plea without conducting any inquiry into the confusion and uncertainty exhibited by him throughout the hearing at which the plea was entered. It also denied his prejudgment motion to withdraw the plea, despite undisputed testimony that he has an IQ in the mid-60's, that his greatest cognitive weaknesses lie in precisely those areas touching most intimately on his comprehension of the matters affected by the plea, that he at no time affirmatively conveyed a comprehension of the plea to his attorney, and that the attorney considered his understanding to be "fleeting" at best. We hold that the resulting record fails as a matter of law to supply the required affirmative showing that defendant made the voluntary and intelligent waiver of rights required for a valid guilty plea. We will therefore reverse the judgment of conviction.

BACKGROUND

Defendant was charged by complaint with four counts of aggravated sexual assault (Pen. Code, § 269) upon his stepdaughter, "Jane Doe," a child under 14 years of age and more than 10 years his junior. The predicate acts for the charges were two instances of oral copulation by means of force or duress (Pen. Code, §§ 269, subd. (a)(4); 288a, subd. (c)(2)), one instance of rape (Pen. Code, §§ 269, subd. (a)(1); 261, subd. (a)(2)), and one instance of sodomy by means of force or duress (Pen. Code, §§ 269, subd. (a)(3); 286, subd. (c)(2)). Each count carried a maximum sentence of 15 years to life, to be served consecutively insofar as the offenses were committed on separate occasions. (Pen. Code, § 269, subds. (b), (c).)

On the date set for preliminary hearing, defendant appeared with retained counsel, Marc Eisenhart, who told the court he was "authorized to proceed with a change of plea."[1] Prosecuting attorney Troy Benson told the court that defendant had agreed to admit guilt on four counts of lewd and lascivious acts upon a child under 14 by force, violence, menace, duress, or fear (Pen. Code, § 288, subd. (b)(1)), with three of the counts to carry the upper term of eight years, and the fourth the mid-term of six years. The offenses would be deemed to have occurred on separate occasions so as to produce full consecutive sentences (see Pen. Code, § 667.6, subd. (d)). The result would be an agreed sentence of 30 years. At the time of the plea defendant was a few months past his 50th birthday.

The prosecutor then undertook to prepare, in open court, handwritten amended charges to which defendant would plead. This proceeded in fits and starts as the charges were revised, first to allege four successive date ranges and then to modify the ranges to

[1] Throughout this opinion, and without further notation, we have corrected the spelling of Eisenhart's name as it appears at various points in the record.

correspond to the victim's birthday. The record contains no amended pleading setting forth the charges to which defendant ultimately pled. However, after the charges were amended to the prosecutor's satisfaction, the court summarized them on the record.

The court then undertook a lengthy "voir dire" of defendant, which culminated in formal waivers of his trial rights. The court recited the four amended charges, asking defendant as to each, "How do you plead . . . ?" and securing the answer, "No contest." The court also secured an affirmation that defendant was "pleading no contest today of [his] own free will." The court declared, "I find that there's a factual basis for the plea. I further find that the plea was made and waivers were made knowingly, intelligently, and voluntarily." The court scheduled sentencing for about two months later.

About a month after the hearing, attorney Eisenhart wrote to the court and the prosecutor stating that he had "received . . . a written communication from my client dismissing me as his counsel and requesting to have his case transferred to a Public Defender for the purpose of withdrawing his plea." The court eventually relieved Eisenhart, appointed the Public Defender's office, and granted a defense motion to appoint a psychologist, Ubaldo Sanchez, Ph.D., to examine defendant in order to assist defense counsel in determining whether defendant had "a legal basis to withdraw a plea based on incompetence at the time of the plea and to determine if he is competent at the present time."

About seven months after the change of plea, Dr. Sanchez evaluated defendant. He found defendant to have an overall IQ of 67 and to be "currently functioning in the mentally retarded range of measured intelligence." Defendant exhibited "[n]o relative cognitive strengths," but exhibited "relative cognitive weaknesses" in the areas of "verbal intelligence; conceptual thinking; numeric manipulation; immediate auditory recollection; general knowledge; social judgment, common sense, reality awareness, judgment in practical situations, and insight into social rules, convention, and nuances; in

his ability to differentiate between essential and non-essential details. . . . Additional weaknesses lie in his capacity for sustained effort, attention, concentration and mental efficiency; and in his ability to view, evaluate and chronicle a situation and its implications." However, he concluded, defendant was "able to understand the nature of the proceedings taken against him and assist counsel in a rational manner in his defense. He does have a basic understanding of the court system. He is able to understand provided explanations are made in simple terms."

The defense filed a motion to withdraw the no-contest plea and enter a plea of not guilty. In addition to presenting Dr. Sanchez's report, the supporting memorandum noted that in the plea-taking hearing defendant "seemed confused on at least four occasions and conferred with his private attorney on numerous occasions . . . ." It recited among other things that when defendant first met with his public defender, he "indicated that he was innocent of the charges and that he only entered guilty pleas because his private attorney pressured him and rushed him through the plea."

The prosecutor filed written opposition, arguing that the plea bargain benefited defendant by giving him "a savings of at least 30 years." Citing the plea-taking transcript, he contended that defendant was "informed of the nature of the charges" and "advised of all of his rights and possible consequences . . . ." He noted the absence of any claim that defendant is an "idiot" so as to be incapable of bearing criminal responsibility (see Pen. Code, § 26) or that he was not competent to stand trial. He contended that the question was vested in the court's discretion and that to justify withdrawal of the plea, defendant had to demonstrate good cause by clear and convincing evidence. He urged the court to "consider the rights of the People," meaning "not only . . . the inconvenience and expense to the state . . . but the trauma that will be caused to the young victim if she were to have to relive the process of the criminal justice system

again."[2]

The court conducted a hearing at which it received the testimony of defendant, Attorney Eisenhart, Dr. Sanchez, and defendant's former wife, Gloria Garza. At the conclusion of the hearing, the court noted the absence of any authority declaring that "because someone has significant subaverage intelligence that they are—they per se don't understand the proceedings." The court opined that defendant "may have been slow, . . . and had to have things repeated, but eventually he did seem to understand them, and I believe that the transcript [of the plea-taking] bears that out." The court found the transcript to be "replete with occasions where [defendant] asked questions when he didn't understand anything . . . ." The court viewed Dr. Sanchez's report to mean that "the defendant is slow, but he's able to make choices that are important in his life, and that's what happened on this occasion." Accordingly, the court denied the motion, finding that the defense had not "met the burden here of showing that the defendant didn't understand by clear and convincing evidence." The court also rejected a defense argument that imposition of the upper term was barred by the absence of a jury finding of aggravating circumstances. It then imposed the agreed sentence of 30 years' imprisonment.

Defendant filed a timely notice of appeal, securing a certificate of probable cause. (See Pen. Code, § 1237.5.) The notice and certificate referred to both the entry of the plea and the denial of the motion to permit its withdrawal.

DISCUSSION

I. *Guilty Pleas—Principles and Review*

For all relevant purposes, defendant's no-contest plea was equivalent to a guilty plea. (Pen. Code, § 1016, subd. (3); 4 Witkin, Cal. Criminal Law (3d ed. 2000) Pretrial

[2] Since defendant had entered his no-contest plea without a preliminary hearing, the victim had never testified.

Proceedings, § 260, p. 468.) A guilty plea effects a waiver of "the fundamental constitutional rights that accompany a trial," and as such "must be knowing, intelligent and voluntary . . . ." (*People v. Collins* (2001) 26 Cal.4th 297, 308 (*Collins*); see *Bradshaw v. Stumpf* (2005) 545 U.S. 175, 183 (*Bradshaw*), quoting *Brady v. United States* (1970) 397 U.S. 742, 748 ["A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.' "]; *North Carolina v. Alford* (1970) 400 U.S. 25, 31 [plea is valid if it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant"].) To enter a valid plea, the defendant must effectively waive the "privilege against compulsory self-incrimination," "the right to trial by jury," and "the right to confront one's accusers." (*Boykin v. Alabama* (1969) 395 U.S. 238, 243 (*Boykin*).) In addition, the defendant must understand the charges against him, meaning that he must be aware of the elements of the charges. (*Bradshaw*, *supra*, 545 U.S. at p. 183, citing *Henderson v. Morgan* (1976) 426 U.S. 637 ["Where a defendant pleads guilty to a crime without having been informed of the crime's elements, this [voluntariness] standard is not met and the plea is invalid."].) The defendant must also be aware of the direct consequences of his plea. (*People v. Panizzon* (1996) 13 Cal.4th 68, 80 (*Panizzon*); see *Brady v. United States, supra,* 397 U.S. 742, 755.)

A waiver is intelligent for these purposes if it is " ' " 'made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it . . . .' " ' " (*Collins*, *supra*, 26 Cal.4th at p. 305.) It is voluntary if it is " ' " 'the product of a free and deliberate choice rather than intimidation, coercion, or deception.' " ' " (*Ibid.*; see *People v. Howard* (1992) 1 Cal.4th 1132, 1177 (*Howard*), quoting *North Carolina v. Alford* (1971) 400 U.S. 25, 31 [test is " 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open

to the defendant' "].)

There is no presumption that a guilty plea possesses the required intelligent and voluntary character. Rather the record must affirmatively demonstrate that the defendant had the necessary knowledge and understanding. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605; see *Boykin, supra*, 395 U.S. at p. 242 [plea not valid "without an affirmative showing that it was intelligent and voluntary"]; *ibid.* [state must "spread on the record the prerequisites of a valid waiver" of defendant's right to contest the charges]; *Bunnell v. Superior Court, supra,* 13 Cal.3d at p. 605[record "shall . . . demonstrate that he understands the nature of the charges"]; *People v. Lucky* (1988) 45 Cal.3d 259, 285 [record must "show by direct evidence that the accused was fully aware of his rights"].) The lack of explicit advisements and waivers will not always require reversal. (*Howard, supra,* 1 Cal.4th at p. 11780 abrogating *People v. Tahl* (1969) 1 Cal.3d 122, 131-134 (*Tahl*).) Nor need advisements be given in technical language; on the contrary, "explanations of these rights will be sufficient when they are phrased in nonlegalistic terms, comprehensible to the average layperson and *when they effectively communicate* to the defendant *the essential character* of the constitutional privileges which he is waiving . . . ." (*People v. Lucky, supra,* 45 Cal.3d at p. 285, italics added) The "message," however, must not "require resort to inference." (*Ibid*., fn. omitted.)

The constitutional validity of a guilty plea is a question of federal law governed by federal standards. (*Howard, supra*, 1 Cal.4th at p. 1175; *Boykin, supra,* 395 U.S. at p. 243.) Federal courts uniformly hold that the voluntariness of a plea entered under given circumstances is a question of law subject to independent ("de novo") appellate review. (*E.g., United States v. Dixon* (6th Cir.2007) 479 F.3d 431, 434; *United States v. Gaither* (9th Cir.2001) 245 F.3d 1064, 1068; cf. *United States v. Smith* (8th Cir.2005) 422 F.3d 715, 724 ["Whether [defendant's] plea was knowing and voluntary is a mixed question of law and fact that is reviewed de novo"]; see *Marshall v. Lonberger* (1983) 459 U.S. 422,

431-432.) The California Supreme Court agrees. (*Panizzon, supra,* 13 Cal.4th 68, 80 ["The voluntariness of a waiver is a question of law which appellate courts review de novo."].) At the same time, questions of "historical fact"—what really happened—are entrusted to the trial court (*Marshall v. Lonberger, supra,* 459 U.S. 422, 431-432), whose findings must be sustained if supported by substantial evidence. (See *People v. Benson* (1990) 52 Cal.3d 754, 779 ["the determination of a trial court as to the ultimate issue of the voluntariness of a confession is reviewed independently," but its "findings as to the circumstances surrounding the confession . . . are . . . subject to review for substantial evidence"].)

The application of these principles is straightforward enough where the trial court's only action in connection with the guilty plea is to accept it. However, a procedural conundrum arises when the court subsequently denies a motion to withdraw the plea. Many cases declare that a motion by a represented defendant to withdraw a guilty plea is " 'purely within the discretion of the trial court,' " whose ruling may be disturbed on appeal only upon " 'a clear showing of abuse of discretion.' " (*People v. Weaver* (2004) 118 Cal.App.4th 131, 146 (*Weaver*), and cases cited.)[3] To treat this as the

[3] Many cases also declare that relief is further restricted by a heightened *burden of proof*: The defendant must establish good cause for relief by " 'clear and convincing evidence.' " (E.g., *Weaver*, *supra*, 118 Cal.App.4th 131, 145; *People v. Wharton* (1991) 53 Cal.3d 522, 585.) The trial court applied this standard here. But this supposed rule, of purely judicial creation, seems difficult to reconcile with the legislative mandate that courts "construe[]" the governing statute "liberally . . . to promote justice." (Pen. Code, § 1018.) The oft-repeated requirement of clear and convincing evidence probably owes its existence to the neglect of three pertinent distinctions. First, many cases blur the distinction, inadvertently or otherwise, between motions brought before judgment is entered—as the motion here was—and those brought afterwards. They also overlook the difference between judgments by plea and *judgments after trial*, which of course are entitled to familiar presumptions of finality and correctness, which in turn presuppose a full opportunity and occasion to litigate all material issues—exactly what a guilty plea forfeits. Finally, the cases owe something to a persistent confusion around the phrase "clear and convincing evidence" itself. That phrase has sometimes been used, especially

governing standard here, however, would allow a local rule of procedure to displace one mandated by the federal constitution. While the trial court undoubtedly has discretion to refuse to relieve a defendant of a constitutionally *valid* plea, it has no discretion to deny relief where the plea is constitutionally unsound. Therefore, while we must defer to the trial court's findings on disputed issues of fact, we must examine the record independently to ascertain whether it affirmatively demonstrates a knowing and intelligent waiver of defendant's constitutional rights.

This raises the further question, however, whether in considering the sufficiency of the record to establish the requisite voluntary and intelligent plea, we may or must take into account the proceedings after the entry of the plea. At least one case may be understood to imply that the validity of a plea must be determined on the record made at the time the plea was entered. (See *People v. Castrillon* (1991) 227 Cal.App.3d 718, 721, italics added ["A guilty plea will not be deemed valid unless the record of the proceedings *before the plea was accepted* reflects that the defendant understood and voluntarily, intelligently, expressly and explicitly waived his *Boykin-Tahl* rights"].) We find this suggestion irreconcilable with the constitutional principles reflected in the

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in older opinions, as an essentially precatory description of the *quality* of evidence necessary to establish a particular point. Later it was adopted in the Evidence Code, and has been supposed in later opinions, to designate a heightened formal *standard of proof*. (See Evid. Code, § 115; *In re Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578, 1585 et seq.; *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 484; *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 289, fn. 6; *People v. Nance* (1991) 1 Cal.App.4th 1453, 1458-1473 (conc. opn. of Timlin, J.).)

Apart from precedential inertia it is difficult to think why a defendant should be required to satisfy a heightened standard of proof to be relieved of a guilty plea, on a motion prior to judgment, when the Legislature has expressly decreed that such relief should be allowed "liberally." However, we need not dwell on the question, because we find reversal warranted by the insufficiency of the record to affirmatively establish the voluntary and intelligent character of defendant's plea.

federal cases. To confine the inquiry to the record as it existed at the taking of the guilty plea would permit a guilty plea to stand even where the record left grave doubts that it was intelligently and voluntarily entered. It stands to reason that in considering the sufficiency of the record to establish the requisite conditions, a reviewing court may and must consider the entire record before it.

This view finds direct support in *People v. Mosby* (2004) 33 Cal.4th 353, 361, where the court held that matters outside the record of the plea-taking may and must be consulted in assessing a claim that the defendant did not make a voluntary and intelligent waiver of his trial rights. The court reiterated its earlier holding that omissions in the trial court's advisements require reversal only where the record fails to " 'affirmatively show[] that [the admission] is voluntary and intelligent under the *totality of the circumstances*.' " (*Id.* at p. 360, quoting *Howard, supra*, 1 Cal.4th 1132, 1175.) This test shifts the focus "from whether the defendant received express rights advisements, and expressly waived them, to whether the defendant's admission was intelligent and voluntary because it was given with an understanding of the rights waived." (*People v. Mosby, supra,* 33 Cal.4th at p. 361.) A reviewing court therefore must go beyond the courtroom colloquy to assess a claim of [omitted advisements]. [Citation.] Now, if the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances. [Citation.] That approach—reviewing the whole record, instead of just the record of the plea colloquy—was recently endorsed by the United States Supreme Court . . . ." (*Id.* at p. 361, quoting *People v. Allen* (1999) 21 Cal.4th 424, 438, and citing *United States v. Vonn* (2002) 535 U.S. 55, 76.)

In sum, where a defendant challenges the constitutional validity of a guilty plea on appeal, the court must independently review the entire record to ascertain whether it

contains the required affirmative demonstration of a voluntary and intelligent waiver of rights. In addressing this question the court must exercise its independent judgment, while accepting the trial court's express and implied findings on issues of fact to the extent they are supported by substantial evidence.

II. *Sufficiency of Record to Sustain Plea*

A. Plea-Taking Transcript

At the plea-taking hearing, the trial court conducted a lengthy "voir dire" in which it secured numerous affirmations by defendant as to his understanding of relevant matters and his waiver of various rights. A defendant's acknowledgment of his rights will generally supply a prima facie basis to conclude that he understands them. (See *Ralbovsky v. Kane* (C .D.Cal. 2005) 407 F.Supp.2d 1142, 1156, citations omitted [a defendant's " '[s]olemn declarations in open court' " usually "carry a strong presumption of verity[,]' [citations], and '[c]ourts generally consider such responses to be strong indicators of the voluntariness of the [defendant's] guilty plea' "].) However, the court may be required to " 'conduct further canvassing of the defendant' " if, " 'in questioning the defendant and his attorney,' " the court acquires " 'reason to believe the defendant does not fully comprehend his rights.' " (*Panizzon, supra,* 13 Cal.4th 68, 83, quoting *People v. Castrillon, supra,* 227 Cal.App.3d 718, 722.)

Here, even before conducting its own "voir dire" of defendant, the trial court elicited the assurance of defense counsel that he had discussed the case with his client and believed that his client understood the matters at stake. Thus Eisenhart affirmed that he had had "sufficient time to discuss this case with [his] client." He then answered "Yes" to the question, "And you and he have discussed his constitutional rights, the direct consequences of the charge, his defenses to the charge, and are you satisfied that—and the elements of the charge, and are you satisfied that he understands each and every one of those things?" Later, at the hearing on the plea-withdrawal motion, counsel would

betray serious doubts about defendant's comprehension of the matters they discussed. But during the change-of-plea hearing he expressed no such doubts.

Ordinarily counsel's affirmations, like a defendant's own, will furnish considerable support for finding that the record affirmatively establishes the validity of the plea. (See *Henderson v. Morgan, supra,* 426 U.S. 637, 647 [it "may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit"]; *Bradshaw, supra,* 545 U.S. 175, 183 ["[T]he constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel. [Citation.] Where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty."].)

Here, however, several countervailing factors operate to weaken the prima facie showing conveyed by the affirmations of counsel and defendant. First and most tellingly, the record is rife with indications that defendant was struggling to understand what was happening. The court began questioning him by securing an affirmation that he had discussed with his attorney his "constitutional rights," "the direct consequences of [his] plea" and "the elements of the charges and [his] defenses to the charges."[4] In a critical exchange, the court then asked, "did you understand each and every one of those things as Mr. Eisenhart explained them to you?" Defendant responded, "*I didn't understand it*," which may have meant that he did not understand the court's question, or did not

[4] "THE COURT: And, Mr. Garza, do you feel you've had enough time to discuss your case with your attorney, Mr. Steinhart? [¶] MR. EISENHART: Eisenhart . [¶] THE COURT: Eisenhart. I'm sorry. [¶] MR. EISENHART: That's okay. [¶] THE DEFENDANT: Yes."

understand at least one of the specified topics of discussion. In response, the court initially demanded, "What didn't you understand?" Then joined counsel in restating the original question, this time securing defendant's affirmation that he understood his discussions with counsel on two of the three subjects—"the discussions [he] had [with counsel] about the charges and defenses" and "the consequences of [his] plea."[5] Defendant did not affirm, then or later, that he understood anything counsel might have told him about the constitutional rights he was about to waive.[6] The court later secured defendant's affirmations that he waived those rights—jury trial, cross-examination, summoning of witnesses, and so on. But nothing in the change-of-plea hearing dispelled the doubt that had been raised about his understanding of what he was waiving.

This expression of confusion was not an isolated event. Defendant went on to express a lack of understanding on eight separate occasions. On each of these occasions he eventually answered "Yes" to the relevant question, but no record was made of the nature of his incomprehension or the means by which it was supposedly dispelled. It further appears that on other occasions defendant exhibited confusion nonverbally,

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[5] "THE COURT: Okay. And have you and he discussed your constitutional rights? [¶] THE DEFENDANT: Yes. [¶] THE COURT: And the direct consequences of your plea? [¶] THE DEFENDANT: Yes. [¶] THE COURT: And the elements of the charges and your defenses to the charges? [¶] THE DEFENDANT: Yes. [¶] THE COURT: And did you understand each and every one of these things as Mr. Eisenhart explained them to you? [¶] THE DEFENDANT: *I didn't understand it.* [¶] THE COURT: What didn't you understand? Did you—what? [¶] MR. EISENHART: If I may. [¶] The question is if you understood the discussions we had about the charges and the defense as it relates to each of these charges. [¶] THE COURT: And the consequences of your plea. [¶] THE DEFENDANT: Yes. [¶] THE COURT: Okay. You understood those conversations. [¶] THE DEFENDANT: Uh-huh. Yes."

[6] We also note that the reformulated question omitted any reference to the *elements* of the charges—not an academic question since the charges had been amended on the same day the plea was entered.

sometimes by saying nothing. Thus, shortly after the "I didn't understand it" exchange, the court attempted to explain to defendant that the amended charges carried a maximum potential sentence of 32 years. Although defendant *expressed* no perplexity, and indeed affirmed that he understood what the court said, the court itself expressed doubt about his understanding, and counsel stepped in to alleviate defendant's manifest "confusion."[7] Shortly thereafter counsel again stepped in to explain something, apparently because defendant failed entirely to respond to a question.[8] On two other occasions the transcript shows counsel "conferring with the defendant" before the latter answers a pending question from the court.[9]

In a supplemental brief respondent asserts that defendant "expressed concern about 'the 85 percent rule' and whether it applied to credits prior to sentencing." This is

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[7] E.g., "THE COURT: Okay. So the maximum sentence you can do on the new charges is 32 years. You understand that. [¶] THE DEFENDANT: Yes. [¶] THE COURT: Okay. [¶] MR. EISENHART: Let me just make sure. [¶] THE COURT: Are you sure? [¶] MR. EISENHART: I think the confusion is he understands the deal is 30 years."

[8] "THE COURT: A no-contest plea will have the same effect for the purpose of these criminal proceedings as a guilty plea would have. If you plead no contest, I will find you guilty based on your no-contest plea and sentence you as if you had pled guilty. Do you understand? [¶] THE DEFENDANT: Yes. [¶] THE COURT: And a no-contest plea could be used against you in a civil case arising out of the charges. You understand that. [¶] MR. EISENHART: If I may, your Honor. [¶] So if somebody were to sue you in civil court, your no-contest plea would be the same as an admission. And do you understand that?"

[9] "THE COURT: You have the right to a preliminary hearing. Do you understand and give up that right? [¶] (Mr. Eisenhart conferring with the defendant.) [¶] THE DEFENDANT: Yes."

"THE COURT: And you have the right to remain silent and not incriminate yourself. Do you understand and give up that right? [¶] (Mr. Eisenhart conferring with the defendant.) [¶] THE DEFENDANT: Yes."

an allusion to the severely limited sentence credit to which appellant would be eligible for good conduct. (See Pen. Code, § 2900.5.) Such an expression of concern by defendant would indeed show a level of insight strongly suggestive of comprehension of other, less esoteric matters. But the record shows that it was counsel, not defendant, who was concerned, and indeed confused, about the credits.[10] While the record further shows that counsel told defendant something about them, and that defendant professed to understand the subject, it does not show that he was concerned about them. Indeed only his bald affirmation suggests that he had the slightest idea what the court and counsel were talking about.

But defendant repeatedly manifested a tendency to affirm that he understood things he in fact did not understand. One was the court's admonition about the maximum sentence, which he said he understood, though he obviously did not. (See fn. 7, *ante*.) Another plain example was the five years of supervised parole to which conviction would subject him. When first apprised of this, he conveyed flat incomprehension. Then, after conferring with counsel, he said that he understood it. Then he allowed that he did "not

[10] "MR. EISENHARDT: Just for clarity of the record, my client's concerned he's still—the 85 percent rule, so we're clear on the record, does not apply to his 2900.5 credits prior to sentencing. [¶] THE COURT: Oh, I think it does. 2933.1 applies to his entire—his entire sentencing, the entire – the entire I think it applies—I—I think I—I know that when they do the calculation for sentencing, the probation department does it pursuant to 2933.1. And when you've got an 85-percent-time situation, that applies pre- and post-sentencing. It's not like the strike, which only applies post-sentencing. I'm pretty—I'm—I'm sure of that. [¶] MR. BENSON: That's my understanding. [¶] MR. EISENHARDT: That was not mine. So I need to clear that up with my client. Take two seconds. [¶] (Mr. Eisenhardt conferring with the defendant.) [¶] MR. EISENHARDT: Thank you, your Honor. I cleared that up with him. [¶] THE COURT: All right. You understand—I did—yeah, that 85 percent applies to the pre- and post- sentencing credits. You understand that, Mr.— [¶] THE DEFENDANT: Yes."

really" understand what parole supervision is.[11] He never did say otherwise, but instead expressed a rather fanciful concern about being required to "stay in the state." Only after two more off-the-record consultations with counsel did defendant affirm that he "underst[oo]d the parole supervision period for five years after [his] release." The record fails to disclose the source of his initial incomprehension or its alleviation—if in fact it was alleviated.

Many of defendant's affirmations were also compromised either by their noncommittal tenor, by the suggestive or ambiguous nature of the questions eliciting them, or a combination of these. This is perhaps most apparent in the court's attempt, already mentioned, to advise defendant that the maximum penalty carried by the charges to which he was pleading was 32 years, rather than the 30 years to which he had agreed.

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[11] "THE COURT: All right. And you would be subject to parole supervision after your release from state prison. [¶] Is that five years or three years? [¶] MR. BENSON: Five years. [¶] THE COURT: Five years. You understand that? [¶] THE DEFENDANT: *Parole, five years?* [¶] THE COURT: Supervision. [¶] MR. EISENHART: Supervision. [¶] *(Mr. Eisenhart conferring with the defendant.)* [¶] THE DEFENDANT: Okay. Yes. [¶] THE COURT: *You understand that.* [¶] THE DEFENDANT: *Uh-huh.* [¶] THE COURT: *And you understand what parole supervision is.* [¶] THE DEFENDANT: *Not really.* [¶] THE COURT: All right. [¶] MR. EISENHART: I explained it. *I'll try it again.* [¶] THE COURT: All right. You'll be given a parole agent. And you'll be required to inform him of your whereabouts. And he'll be directing your conduct and perhaps assisting you with programs to assist you in your transition back into the community. And he'll be supervising your activities once you're released to make sure that you're conforming with the parole requirements. Do you understand that? [¶] THE DEFENDANT: *Would I have to still stay in the state?* [¶] *(Mr. Eisenhart conferring with the defendant.)* [¶] THE COURT: That won't be my decision. That will be theirs. [¶] THE DEFENDANT: Okay. [¶] THE COURT: But possibly. I—I think it's a possibility. Okay? [¶] THE DEFENDANT: Uh-huh. [¶] THE COURT: At least during your parole period. [¶] MR. EISENHART: So you understand the parole supervision period for five years after your release? [¶] *(Mr. Eisenhart conferring with the defendant.)* [¶] THE COURT: You understand that. [¶] THE DEFENDANT: Yes." (Italics added.)

After defendant silently betrayed confusion, the court secured two "Okay" responses, and one "Yes" to the court's own interrogative "Okay?"[12] On the face of the record, however, these responses were at best ambiguous as to whether defendant was affirming an understanding on his own part, rather than assenting to the court's statements about its own function and intentions. At one point defendant seemed to understand that he was supposed to say "Yes" rather than "Okay," since he responded "Okay. Yes," to the question whether he understood parole supervision. Unfortunately, as previously noted, he immediately contradicted this affirmation by saying that he did "[n]ot really" understand what parole supervision is.

The only attempt to commence an on-the-record dialog concerning defendant's comprehension came from defendant himself, when after an explanation of the effect of parole violations he said, "I just have one question." The court spurned this attempt, stating, "Well, you may ask your attorney." This was followed by yet another off-the-record consultation. The court also failed to pursue defendant's suggestion that his diabetes could affect his mental functioning.[13]

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[12] "THE COURT: [T]his is the maximum you could do for just these charges. It's not what you're going to get, but it's the most you could do on these charges. It's—it's the term that these charges—the most time these charges carry with them. There's an agreement that you will do less time than that, which I'll explain in just a moment. [¶] THE DEFENDANT: *Okay.* [¶] THE COURT: I just need to tell you that if you got the maximum on all these charges, you would do 32 years. [¶] THE DEFENDANT: *Okay.* [¶] THE COURT: The agreement is, however, that you would do 30 years, which I'll get to in just a minute. *Okay?* [¶] THE DEFENDANT: *Uh-huh. Yes.* [¶] THE COURT: Okay. Thank you." (Italics added.)

[13] "THE COURT: Have you consumed any drug, alcohol, narcotic, or medication within the last 48 hours, or are you currently under the influence of any of those substances? [¶] THE DEFENDANT: I'm a diabetic. I take insulin. [¶] THE COURT: All right. Does that affect your ability to think and understand clearly what is happening today? [¶] THE DEFENDANT: If I *don't take* the— [¶] THE COURT: I didn't hear you. [¶] MR. EISENHART: She's asking you if any of the medication you *have taken* in the last 48 hours affects your ability to understand what's happening now, today.

Despite defendant's manifest uncertainty about relevant matters, the court at no time attempted to go behind his hesitant affirmations to determine what, if anything, he actually understood. The questioning resembled less an earnest inquiry into his knowledge and comprehension than a cross-examiner's interrogation intended to elicit admissions from an opposing witness. Indeed the court's questioning was so directive, not to say coercive, that much of its "voir dire" consisted not of interrogative questions but of admonitions followed by the positive assertion, "You understand that," to which defendant duly acceded. Thus the declarative sentence "You understand that" appears in the transcript 15 times, while the interrogative "Do you understand that?" appears only five times.

These proceedings are not sufficient to establish a voluntary and intelligent plea on the part of someone, like defendant, who is also shown to possess cognitive difficulties relating directly to his ability to understand the significance of his plea. In conducting a change-of-plea hearing the trial court must establish to its own satisfaction, *and as a clear matter of record*, that the defendant actually does understand the rights he is waiving and the consequences of his doing so. With a person of ordinary intelligence, this may require no more than that the court secure the defendant's acknowledgment of the nature of the charges, the consequences of the plea, and the rights he is giving up. But once the defendant furnishes any reason to question his comprehension, his mere naked affirmation that he understands relevant matters ceases to be sufficient. It then becomes incumbent upon the court to engage him in a more searching dialog. In particular, if the defendant appears to possess limited intelligence, it becomes critical for the court to address him in terms he appears able to understand and to ascertain whether

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[¶] THE DEFENDANT: No, not really. No. [¶] THE COURT: No? [¶] THE DEFENDANT: No." (Italics added.)

he does in fact understand, for example, the concepts of a trial, cross-examination, the right to call witnesses, and the right not to testify, as well as the effects of the plea, and its binding and irrevocable character. A court may be justified in supposing that a person of ordinary intelligence understands these concepts when they are explained to him in standard courtroom terminology. But such a supposition can no longer be indulged when the defendant exhibits significant deficiencies in intellectual ability.

We therefore find the transcript of the change-of-plea proceedings insufficient to establish that defendant in fact possessed the understanding required for an intelligent, voluntary plea. The court never undertook even a "brief examination to ascertain defendant's understanding" of the matters on which he seemed to balk. (*Tahl*, *supra*, 1 Cal.3d at p. 132.) Nor did it exhibit the slightest solicitude, let alone "the utmost solicitude of which courts are capable," "to make sure he ha[d] a full understanding of what the plea connotes and of its consequence." (*Boykin*, *supra*, 395 U.S. at pp. 243-244.) Absent was any direct inquiry into the nature or cause of his recurring bewilderment. In our view, whenever there is a question about the defendant's understanding, the court should adopt the simple expedient of *asking him what it is*. Instead, time and again, the trial court relegated defendant to an *off-the-record* colloquy with counsel, after which he ostensibly affirmed his understanding of the matters at issue. The absence of direct evidence of defendant's actual understanding leaves the transcript insufficient to demonstrate more that a rote recital in the *form* of a waiver of rights.

B. Effect of Evidence at Plea-Withdrawal Motion

1. Defendant's Testimony

As we earlier concluded, our inquiry is not confined to the record of the plea but must include examination of the entire record to ascertain whether it furnishes the requisite affirmative showing that defendant entered his plea intelligently and voluntarily. Apart from the plea-taking hearing, the record consists largely of the transcript of the

hearing on defendant's motion to withdraw his plea. Far from establishing the intelligent character of his plea, the evidence at that hearing could only emphasize the gaps in the plea-taking proceedings. Indeed, even if the transcript of the change-of-plea hearing were sufficient on its face to establish the validity of an otherwise proper guilty plea, its reliability is so thoroughly impugned by the evidence adduced at the plea-withdrawal hearing that it cannot supply the necessary affirmative demonstration that the plea had the requisite knowing and intelligent character.

Certainly defendant himself gave no testimony suggesting that he entered his plea with an understanding of his rights, the charges, or the consequences of the plea. Called to testify by his new counsel, and asked if he knew why he was "before the court," he replied, "Uhm, a little bit. It's because I'm—I—let's see. Uhm, because I said something maybe I'm not supposed to say. I mean, like, uhm . . . ." (Ellipsis in original.) He remembered entering a no-contest plea, but did "[n]ot really" remember what charges he pled to; "I just said no-contest." With some prompting he acknowledged being accused of molesting his stepdaughter, but he did not remember "exactly what the charges were that [he] entered guilty pleas to."

Asked whether his lawyer talked to him about "certain rights that you have," defendant said, "I don't remember. I don't know if he did or he didn't talk to me, but I don't think so." He did not think his lawyer had told him about "the right to confront witnesses against you, and have your lawyer ask them questions and cross-examine them." The only thing he remembered from their conversation was "something like, 'You have to get the 30 years, or you're going to get a lot more.' "

Asked about talking to the judge at the plea-taking, he initially said, "I think—I think the judge asked me a question, but I—I just wanted to say 'yes.' I think so." Asked if he remembered the judge telling him he had certain rights that he had to give up in order to enter a no-contest plea, he testified, "Uhm, I don't really remember. The judge

said all that stuff. I just said, 'Oh, oh, yeah.' " He testified to the same effect when asked whether he remembered "what it was that the judge told you": "Not—I don't really remember what he [*sic*]—the judge was saying. I—I didn't really know what he [*sic*] was saying. I just said, 'Yeah.' "

Asked whether he had "any recollection if on May 23rd you understood what you were being told," he replied, "Uhm, I don't really remember. Oh, 'understand,' you mean? Uhm, I didn't really understand very much of anything. I just know I wanted to go home."[14] He "guess[ed]" that he entered his plea with the knowledge that he would "get 30 years." However, he answered "No" to questions whether he remembered knowing that he had a right to a jury trial that he was giving up; whether he knew that he had a right to confront witnesses against him; and whether he knew what a jury trial is. Asked whether he knew what the right to confront witnesses is, he replied, "Uhm, some friends said that to talk to some people that know me." Asked if he understood the right to call witnesses on his behalf, he said, "Uhm, not really, I don't. Some friends tried to explain it to me. The ones I have now. Uhm, but I don't know any of that stuff." He was not sure, but did not think anyone said anything about that right when his plea was taken. He could not remember what other things the judge might have told him on that occasion. Direct examination concluded with the following question and answer:

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[14] Of course the only chance for defendant to "go home" in the next three decades, and probably the only chance to ever go home (see fn. 21, *post*), was to put the prosecution to its proof and hope for an acquittal. Yet his bizarre allusion to "go[ing] home" was echoed in his account to Dr. Sanchez of why he was in jail. He said that when asked by an officer about the charges, he had given false affirmative answers in order to end the questioning: " 'I like, I said "yes" because I was tired. I just wanted to go home. . . . She said maybe five times, so I said "yeah," I think. She said 3, 4, 5 times I think. She asked me if I did that. I said "yeah." I told her "yes" on everything. I just wanted to go home. Then she asked me to sign a paper. I asked what it said. She said it wasn't important. It was just that I went there. I said "can I go home if I sign it?" She said "yeah, that will be all." She will let me know what she decides.' "

"Q. . . . When you entered your pleas of no-contest in this courtroom, did you know what was going on as far as what rights you had and what rights you were giving up? [¶] A. No. I just know that, uhm—that I was going to come in here, and the judge was going to tell me if I'm going to go home or not."

On cross-examination the prosecutor established that defendant had successfully obtained a driver's license. Defendant gave an unintelligible account of how he studied for and took the qualifying examination.[15] The prosecutor also elicited testimony that was at best equivocal on the question whether defendant exhibited any mental aptitude in his job at a plastic parts factory.[16]

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[15] "Q. Mr. Garza, you've got a driver's license, right? [¶] A. Yeah. Well, not no more. [¶] Q. But you went down to the DMV and you filled it out. You took the test, right? [¶] A. Yeah. [¶] Q. You passed it? [¶] A. Uh-huh. [¶] Q. You read the—you read the form, correct? [¶] A. Uhm, not really. They gave me a list, and I just remember—tried to remember them, the ones where they make an 'x' on the box. [¶] Q. You just remember the answers and passed the test, correct? [¶] A. Well, I copied what was on there on that. [¶] Q. Okay. You took it to practice. So how did you study for the driver's test, Mr. Garza? [¶] A. Study for the test for the driver's license? [¶] Q. Yeah. [¶] A. There was a list that was just like the same one that I was going to—like one I copied on. [¶] Q. Yes, there's sample questions. [¶] A. Huh? [¶] Q. They have sample questions that you got—you got a booklet, right? [¶] A. No, a list. No, it was just a long white list with the—with three boxes on them (indicating), and one of them would have an 'x,' a red 'x' on it, and I would just put it with a pencil on the other one. [¶] Q. Okay. You somehow just remembered what the question looked like, and then marked the right answer, is that correct? [¶] A. I don't know. I had a paper. I don't— [¶] Q. All right. And you then took the test with an instructor, right? You had to take a driving test, right? [¶] A. Oh, yeah, uh-huh. He would tell me how—where to turn and where to park the car. [¶] Q. And you passed that, correct? [¶] A. Yes. [¶] Q. So you got a driver's license? [¶] A. Uh-huh. [¶] Q. You signed your name? [¶] A. Uh-huh."

[16] Although defendant's testimony is not easily deciphered, its apparent gist is that his job consisted of removing a part from the assembly line and separating the usable portion from a non-usable portion, which was thrown away. He could operate as many as four of the machines there. He did not teach other people how to use the machines; that job was entrusted to "people that had like reading parts . . . ." On some of the machines

The prosecutor then questioned defendant at length about his communications with Mr. Eisenhart, among other things. Defendant testified that he did not remember what Eisenhart had told him. "He—I don't know if I asked him. I just wanted to—what did I ask him—oh, well, he came to tell me that he was going to be my lawyer, and, uhm, and I think I said, 'Okay.' And then he was going to talk to me. [¶] Q. What did he—[¶] A. I guess on another week at another time, I think, or another time. I don't know how. [¶] Q. And did he do that? [¶] A. Uhm, I think he was busy or something. I don't know. I just know that he was going to talk to me." Defendant acknowledged having "another lawyer now," but when asked, "And what does this lawyer do for you?" he replied, "I don't know"

He denied knowing, on his previous visit to court, that his stepdaughter was outside. He did not think Eisenhart ever told him that. He was then asked about his understanding of the sentence to which the charges and his plea exposed him: "Q. Okay. When he said that you were going to get a[] lot more years— [¶] A. Uh-huh. [¶] Q. —did he tell you that those years were going to be 60 years to life? [¶] A. Uhm, I don't—I don't know. I just know that he said I was going to get a lot of years, maybe like 40 or more years, and—and he wanted to know right—right now if I'm going to take the 30 years, or—or I'm going to get more years. [¶] Q. And you know 30 years is less than even 40, right? [¶] A. Yeah. [¶] Q. Okay. And less would be good in this situation, right? You'd want to do less time than more, wouldn't you? [¶] A. I guess so because he didn't—uhm, I didn't want to do any time at all."

Shortly thereafter the subject was revisited, as follows: "Q. Okay. And when the judge was asking you if you understood that you would be serving 30 years in prison, you

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"they wanted me to go faster, but I couldn't go faster, so they just showed me some other ones that I can do."

understood that, correct? [¶] A. 30 years? Uhm, I guess so. I think you're supposed to do—you're not supposed to—well, I don't know. [¶] Q. You guess so, Mr. Garza? [¶] A. Uh-huh." Asked whether he had understood, when the judge asked him, that he was giving up his right to a jury trial, he replied, "Uhm, not really. I just said, 'Yeah.' "

The prosecutor told defendant that he had asked his attorney questions at several points during the plea-taking, an assertion to which defendant acceded although it is contradicted by the transcript.[17] The prosecutor sought a categorical confirmation that defendant sought clarification "[w]henever you didn't understand something," but defendant replied only "Sometimes." He acknowledged being "[a] little bit" scared to ask his attorney for clarification. He expressed only bewilderment at the prosecutor's efforts to confirm that defendant had sought and obtained clarification on specific points such as the potential use of his no-contest pleas in civil litigation.[18] Asked whether Mr. Eisenhart explained things when defendant asked, defendant replied only, "Uhm, I guess so." Asked whether he had understood that he was "pleading to 30 years in prison [and]

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[17] The plea-taking transcript attributes two interrogative utterances to defendant: "Parole, five years?"—scarcely a real question—and "Would I have to still stay in the state?" On another occasion he said he had a question, but the court declined to hear it.

[18] "Q. Okay. And one of the times you stopped your attorney, the judge was asking you or telling you that a no-contest plea could be used against you in a civil trial, and you asked your attorney about that. Remember? [¶] A. No. What's that? [¶] Q. Well, did you ask your attorney how a no-contest plea could be used against you in a civil trial? [¶] A. I don't remember. What's that?"

Again the premise of the question—that defendant "stopped his attorney" and "asked about" the civil effect of the plea—is flatly contradicted by the record. At the plea-taking, the court told defendant that a no-contest plea could be used against him in a civil case, and then said—without a question mark—"You understand that." Nothing more appears on the record until counsel says, "If I may, Your Honor," followed by counsel's explanation on the point—in this rare instance, on the record. So far as the record shows, however, defendant simply stood mute until counsel acted in apparent response to defendant's manifest bewilderment.

that [his stepdaughter] had said that she had—that you had had sex with her," he testified, "I didn't understand that."

Obviously, nothing in this testimony had the slightest tendency to suggest that defendant actually understood what he was doing when he entered his plea. Even if the court had grounds to disbelieve defendant entirely—which would presuppose that he was not only prevaricating but playacting—that view would not supply the requisite affirmative showing that he entered his plea voluntarily and intelligently.

2. Eisenhart Testimony

Attorney Eisenhart, called by the prosecutor, likewise failed to supply any ground for concluding that defendant had in fact made an intelligent waiver of rights. On the contrary, his testimony strongly suggested that defendant had in fact failed to understand the matters at issue.[19] Under questioning by the court, Eisenhart acknowledged that when

[19] Despite the prosecutor's best efforts, Eisenhart repeatedly refused to speculate about what defendant actually understood or failed to understand. The court's treatment of these questions, and of "speculation" generally, seems curiously inconsistent. Early in the hearing the court lectured Eisenhart that "We don't want guesses. This is not about speculation, so let's not do guesses. Just facts, please." Two pages later the court overruled a defense objection on grounds of "speculation" when the prosecutor asked Eisenhart whether defendant "understood what he was being charged with . . ." Numerous questions of this tenor followed, with Eisenhart consistently—and quite properly—insisting that he did not know the answers. But prepared as the court was to let a lay witness testify about another person's mental state, it was unwilling to let a licensed psychologist give routine expert opinion testimony. Thus the court sustained a prosecution objection of "speculation" when defense counsel asked Dr. Sanchez how specified hypothetical facts would affect his inability to diagnose defendant as mentally retarded. (See 1 Witkin, Cal. Evidence (4th ed. 2000) Opinion, § 27, p. 557.) A few pages later the court agreed with the prosecutor that it would be "speculation," or perhaps "argumentative," for Dr. Sanchez to say whether it is "possible for a mentally retarded child to get a high school education through a special ed program." In the next breath the court undertook to *rebut the evidence it had just excluded*, asking, "Is everyone in special ed mentally retarded?" When defense counsel tried another tack, the court again rejected the question as "argumentative," then again took pains, by leading questions on the same topic, to blunt the point it had just prevented counsel from making. It seems impossible

he told the court at the commencement of the plea-taking that he believed defendant understood relevant matters, that statement was true.[20] However, when asked whether he believed defendant was "making a reasoned choice between the two alternatives presented to him," Eisenhart could cite no basis beyond his own *statements to* defendant: " . . . I didn't get an indication *from Mr. Garza* that he had executed in his mind a reasoned analysis of the deal, and I didn't get from Mr. Garza that he did not execute a reasoned analysis of the deal. That was my perception. *My perception was a non-perception,* and *I proceeded with the plea on that day based on the knowledge that I had made what I felt were ample communications in an objective sense for the objective client*." He went on to say that defendant had been disturbingly unresponsive throughout their interactions: "[I]t's always nice when that client can actively listen, meaning parrot back what we're saying, nod their head regularly when I suggest why the reasoning is apt. [¶] . . . [¶] I communicated those types of things. *I just simply didn't get anything*

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to fit all these actions within a consistent, let alone correct, conception of the opinion rule. (See Evid. Code, §§ 800 et seq.)

[20] The court asked Eisenhart whether he was "forthright" during the plea-taking, "when you told me that you believed your client understood all those things?" Eisenhart replied, "I believed that he understood them." The court initially cut off his attempt to explain, but apparently thought better of it, allowing him to expand as follows: "[T]here are two sort of issues that . . . are related to . . . the court's question and answer. One is what I—when you're asking me if my testimony or my—sorry—my belief that he understood all of those things, the Constitutional rights, direct consequences of the charges, et cetera. [¶] THE COURT: The elements of the charges, defenses. [¶] THE WITNESS: Right. [¶] THE COURT: All those things. I covered all those things in my question to you. [¶] THE WITNESS: You did, and I did say 'Yes.' . . . I certainly have had the experience where I felt more satisfied than in this particular situation with other defendants based on the colloquy that happens back and forth, and I— [¶] THE COURT: *You didn't tell me that, though, at the time, did you, that you had some concerns or reservations?* [¶] THE WITNESS: I was satisfied he understood it, as [*sic*] I said so. I couldn't say extremely satisfied. . . ."

back from him, body language you mentioned earlier, emotions. There was a—especially anything that's kind of a higher brain activity in terms of reasoning that there was a weighing of things beyond just a mere comprehension of the words. [¶] . . . *I didn't get anything one way or the other on whether or not Mr. Garza was actively reasoning through the choices before him*."

This unresponsiveness characterized their entire interaction, not just discussions of the plea. Eisenhart found defendant "a very challenging client to communicate with," who would "let me talk" without seeming to react. He thought there were "moments where . . . it felt like we were connecting cognitively about the subject matter, that is, his case and/or defenses[,]" but these were "fleeting." Also "fleeting" were any comments by defendant that could be "construed as contributing . . . to the attorney-client dialogue about the facts of the case . . . ." Eisenhart did not find it necessary to "speak very slowly" to defendant, but "there was a whole lot of repeating, restating, reformulating that happened during our conversations." Sometimes this was the result of defendant asking questions, but at others it was necessitated by defendant's unresponsiveness to what he was told.

Eisenhart was also taken aback by defendant's manifest confusion during the plea-taking. "[P]rior to going on the record," he felt defendant "understood the terms of the deal . . . ." But "that feeling wasn't heightened or very strong. *It was a little disconcerting on the record when he was appearing confused about a couple of matters.*" His confidence in defendant's comprehension was lower than with other clients: "I certainly have had the experience where I felt more satisfied than in this particular situation with other defendants based on the colloquy that happens back and forth . . . . [¶] . . . [¶] I was satisfied he understood it . . . . I couldn't say extremely satisfied."

Defendant's limited comprehension of the proceedings obviously placed Eisenhart in a delicate position both in advising his client with respect to a plea bargain and in

testifying about it later. Obviously Eisenhart believed that acceptance of the plea bargain, and thus entry of the no-contest plea, was in defendant's best interest. He testified that he talked to defendant "about the fact that it was communicated to me very clearly that the goal of the People in this case was to ensure a disposition that would effectively cause Mr. Garza to expire while he was still in custody serving his sentence. Those are potent facts that you communicate to your client to help him in this case obviously effectuate this reasoning that you're talking about, the weighing of the choices before entering a plea. [¶] . . . [H]ere we had a determina[te] sentence that would, although maybe not tremendously likely, lead—possibly defeat the goal of the People. Maybe, just maybe, he would be out for some period of time after—before he dies, obviously. [¶] I communicated those types of things."

Because Eisenhart believed the plea to be in defendant's best interests he would naturally be inclined, in discussing it with defendant, to emphasize the advantages of the bargain rather than its negative consequences. Thus he denied that he had coerced defendant to accept the offer, but allowed that he had "recommended it" "very strongly." Yet the bargain could not take effect unless defendant's plea represented a voluntary and intelligent choice. This would naturally incline Eisenhart to construe events in a manner consistent with the conclusion that defendant did in fact understand the situation sufficiently to enter a valid plea. As Eisenhart later admitted, however, his only basis for so concluding was the "objective" sufficiency of *his statements to defendant*. Defendant at no time responded in a way that reflected "active[] reasoning through the choices before him."

It seems anyone's guess whether defendant was able to appreciate, let alone whether he in fact understood, the tenuousness of the benefit gained by the plea bargain.[21]

[21] The odds of defendant's surviving a 30-year term were slight. At the time of sentencing he was 51 years old. By our estimate, a 30-year sentence subject to the credit

What he was likely to absorb was that his attorney thought he should accept it, and that in order to do so he had to answer the court's questions affirmatively. This is consistent with his own testimony that the only thing he remembered from his conversations with Eisenhart was, "something like, 'You have to get the 30 years, or you're going to get a lot more.' " Similarly, he recalled nothing that the judge had told him at the plea-taking; he "just wanted to say 'yes.' "

3. Sanchez Testimony

In his report Dr. Sanchez had written that defendant tested with "a Verbal IQ score of 66, a Performance IQ score of 75, and a Full-Scale IQ score of 67 on the WAIS-III. This indicates that he is currently functioning in the mentally retarded range of measured intelligence." Defendant exhibited "[n]o relative cognitive strengths," but exhibited "relative cognitive weaknesses" in the areas of "verbal intelligence; conceptual thinking; numeric manipulation; immediate auditory recollection; general knowledge; social judgment, common sense, reality awareness, judgment in practical situations, and insight into social rules, convention, and nuances; in his ability to differentiate between essential and non-essential details. . . . Additional weaknesses lie in his capacity for sustained effort, attention, concentration and mental efficiency; and in his ability to view, evaluate

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limitations applicable here (see Pen. Code, § 2933.1) would permit his release no sooner than his 76th year. The prosecutor seemed to have made a similar calculation, arguing that defendant received "the possibility of parole before he is 80 years old versus what would surely be a death [*sic*] sentence." An online calculator yields a life expectancy of about 65 years for someone who is, like defendant, a male diabetic, 51 years old, five feet five inches tall, weighing 170 pounds, with two qualifying stressful experiences in the preceding 12 months (loss of partner and criminal prosecution). (How Long Will You Live – Life Expectancy Calculator <http://gosset.wharton.upenn.edu/mortality/perl/CalcForm.html> (as of Jun. 11, 2009).) Thus, while the plea agreement yielded the naked possibility of eventual freedom, a rational defendant might well conclude that the odds of realizing that possibility were not significantly better than the odds he would face at trial.

and chronicle a situation and its implications."

Dr. Sanchez also reported that defendant "counted on his fingers during the arithmetic subtest" and "required a little longer than usual to respond to questions." Defendant reportedly claimed to have a high school diploma, but also told Sanchez, " 'The teacher said if anybody asks to say I graduated with a C or D. I remember that. I used to go to a special ed class. I went to the 12th grade. I never learned how to read or write." He reported that family members told him he might qualify for Social Security Disability because he is "kind of slow." He regularly consulted with family members because "they help me sometimes to make a decision." He was "able to cook simple things" and "like[d] to make sandwiches," but despite longstanding diabetes, he tended to eat what family members described as "junk," including "potato chips and a lot of candy."

When asked about the charges, defendant seemed to understand their general nature, although Dr. Sanchez had to explain the terms "oral copulation" and "sodomy."[22] Defendant told Dr. Sanchez that he and his wife had been intending to divorce because she did not like his family. " 'She moved away. That's when the police came to take me away and bring me here. That's when she came and told me that my stepdaughter had a little book. That's what she told the police, and that they are going to put me away for a lot of years.' " Defendant said he had entered a plea because his lawyer " 'said if I didn't, they would give me a lot of years.' "

At the hearing Dr. Sanchez testified that his had been "a 1017 examination," the

[22] Dr. Sanchez's references to "sodomy" and "oral copulation" indicate that the charges he was discussing with defendant were those in the original complaint, not those to which defendant had entered a no-contest plea. This stands to reason since there was no written statement of the latter, which contained only general allegations of "lewd and lascivious act[s]." It seems doubtful that a vocabulary too limited to include "sodomy" would include "lewd" or "lascivious."

purpose of which was "[u]sually . . . to see whether the defendant is competent to stand trial, whether they can understand the attorney, if there's a history of mental illness, sometimes recommendations for treatment." He found defendant competent to stand trial. He acknowledged that his finding of competence at the time of the evaluation did not mean defendant was competent at the time he entered his plea. He also acknowledged that competence to stand trial means only "that [the defendant is] able to understand the court process and the way the court functions, and also . . . rationally able to assist his attorney in conducting his defense." He found that defendant satisfied "both of those prongs." He articulated no specific respects in which defendant was able to assist in his defense, but he did find defendant "able to understand the court system." By this, however, he meant only that defendant understood "the function of his attorney and of the judge and also of the D.A."[23]

He confirmed that he found defendant to have "a full scale IQ of 67." Defendant's lowest score was on the "comprehension" component of the test, which would correspond approximately to "common sense[,] reasoning, social judgment." Defendant had a higher "performance" score, but—contrary to the trial court's apparent understanding—this did not measure the "ability to understand concepts," but instead corresponded approximately to "right cerebral functioning . . . nonverbal problem skills. Usually, your vision and perception motor skills." Among defendant's numerous areas of cognitive weakness were "immediate auditory recollection," which is the ability to remember what has just been said, and "reality awareness," which is "comprehension,

[23] In his report Sanchez wrote: "Mr. Garza describes his attorney's role: 'He talks to the judge person. He does not want to hear from us. He helps me.' The judge's role: 'He tells you if you are going to stay in jail or if you are going to go home.' The district attorney's role: 'They tell me the DAs are the bad people because they don't want you to go home.' " Sanchez testified that when defendant said, "He does not want to hear from us," the "he" referred to the judge and not the attorney.

common sense, reasoning"—the "[s]ame thing" as "[j]udgment in practical situations."

Asked whether he thought these weaknesses would indicate "possible difficulties for him to understand legal concepts," Dr. Sanchez replied, "If you explain the concept to him, he will understand it." He allowed that it would have to be explained "[w]ith easier words" and that his comprehension would depend on his mental condition and such factors as his diabetes.[24] He characterized defendant's "judgment regarding decisions affecting his own well being" as "fair," meaning, "[I]t's not great. He's . . . not a real bright individual." He allowed, however, that defendant is able to make such decisions.

Dr. Sanchez acknowledged that he did not conduct any tests to ascertain whether defendant was "malingering." He would have conducted such an exam had he suspected defendant of not "try[ing] as hard" or attempting to "pull one over." However, he "really did not think that [defendant] was trying to malinger."

Dr. Sanchez repeatedly acknowledged that he had not and could not "diagnose the defendant as mentally retarded" without having found impaired adaptive functioning before the age of 18. The diagnosis was impossible not because it was incorrect, but "because there's no evidence of mental retardation prior to the age of 18." Over an objection that the court sustained on grounds of "speculation" (see fn. 19, *ante*), Dr. Sanchez testified that if there had been evidence of impaired function prior to that age, it might have produced a different diagnosis. He acknowledged that in doing an evaluation, he had no way of knowing whether he had been provided with the subject's complete history.

The court elicited testimony from Dr. Sanchez that the "range for error" in IQ testing is "[t]en points"—"five" either way. Dr. Sanchez acceded to the court's assertion

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[24] Dr. Sanchez testified that defendant's diabetes could affect his mental functions in that "sometimes if your blood sugar goes real high or real low, that can affect your concentration and attention, make you feel real weak."

that defendant "could have an IQ—without doing totals, he possibly falls within the borderline area." However, Sanchez also agreed that defendant's IQ could be as low as 62.

Dr. Sanchez further testified that counting on the fingers during arithmetic testing signifies that "concentration and attention are not real quick," or that the subject has a "deficit in arithmetic skills." Defendant used his fingers starting with the first arithmetic question, which was "how much is $4 plus $5." Asked about the statement in his report that defendant understood the charges against him and why he was in custody, Dr. Sanchez failed to articulate what defendant's understanding was beyond the accounts stated in the report, i.e., that defendant was in jail for lying to a police officer in order to end some questioning.[25] Although he had written in the report that defendant "demonstrated no discernible signs of visual, auditory [or] olfactory hallucinations," this meant only that defendant "did not display any evidence that he was responding to . . . voices or internal stimulation or commands or anything like that during the evaluation." This did not conflict with Dr. Sanchez's statement that defendant reported "hearing 'friends, but my sister tells me they're evil spirits, so I ignore them.' "

Dr. Sanchez found that defendant seemed "able to understand the nature of the proceedings taken against him and assist counsel in a rational manner in his defense."

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[25] Dr. Sanchez had written that defendant denied molesting his stepdaughter and thought he was in jail for falsely acceding to his stepdaughter's accusations, as related by a police officer, in order to end the questioning: " 'I like, I said "yes" because I was tired. I just wanted to go home. I had bought candy bars. I know I was not supposed to eat them. That's why I said "no" when she offered me an apple or something to drink. She said maybe five times, so I said "yeah," I think. She said 3, 4, 5 times I think. She asked me if I did that. I said "yeah." I told her "yes" on everything. I just wanted to go home. Then [she] asked me to sign a paper. I asked what it said. She said it wasn't important. It was just that I went there. I said "can I go home if I sign it?" She said "yeah, that will be all." She will let me know what she decides.' "

This was based on defendant's arguably somewhat accurate if child-like account of the roles of his attorney, the judge, and the prosecutor. (See fn. 23, *ante*.) These facts doubtless supported Dr. Sanchez's opinion that defendant was competent to stand trial. (See Pen. Code, § 1367 ["A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."].) But the question before the court was not whether defendant was able to understood the situation well enough to aid in his defense.[26] It was whether he adequately understood the charges against him, the consequences of conviction, and the constitutional rights he forfeited by entering a guilty plea, so that it could be said that his plea reflected an intelligent choice between alternatives. Competence concerns the *ability* to comprehend (see *Godinez v. Moran* (1993) 509 U.S. 389, 396), but the question here was *actual* comprehension. Dr. Sanchez was not asked to opine, and did not opine, on defendant's actual comprehension of his rights, the charges, possible defenses, or the consequences of conviction. In the present context, Sanchez's testimony was relevant chiefly for establishing that defendant had seriously limited powers of comprehension with respect to matters of the type he was called upon to comprehend in order to enter a valid guilty plea.

4. Gloria Garza Testimony

Called by the prosecution, Gloria Garza, defendant's ex-wife and the mother of Jane Doe, testified that she and defendant met in an electronics class at CET, a training school. The class was difficult for her, but not for him. She never thought that he wasn't very smart. He spoke English and Spanish with equal fluency.[27] He could read in both

[26] Even here Eisenhart described defendant's helpful input as "fleeting."

[27] It is unclear how she was able to attest to his fluency in English, since she herself was testifying through a Spanish interpreter.

English and Spanish. They both paid the bills. Defendant used the checkbook. He had a driver's license and drove to work. When they had decisions to make, both would make them.

On cross-examination she testified that defendant read "once in a while" from the Bible and the newspaper. He would sometimes read the newspaper aloud to her in English as well as Spanish. Asked about his writing, she seemed to indicate that he only wrote in English. Asked whether she filled out applications and things like that for him, she replied, "Not all the time." Asked why she would do that, she replied, "Because it took him longer to fill out the application." She acknowledged an example, which was marked as an exhibit. She did not remember filling out a second example. She did not remember how many applications she filled out for him. She denied filling out any other kinds of documents for him. She acknowledged that she paid the bills more often. She denied that when important mail came for him, she would write instructions on the envelope. She denied that the handwriting on an envelope marked as an exhibit was hers. She believed defendant had some knowledge about the law and the criminal justice system based on things he told her when he was arrested for drunk driving, but she could not remember what those things were.

She understood that he was seeking to withdraw his plea, and that if he succeeded she and her daughter would have to come to court and testify. She didn't want her daughter to have to come to court anymore. She felt that "[h]e have to admit what he did." "I believe that the law has to take charge here and make him responsible for what he did."

The court did not permit counsel to ask Ms. Garza whether she observed any difference between defendant's appearance and demeanor at the plea-withdrawal hearing and prior to his incarceration. Counsel observed that "[h]e has a blank stare about him," and apparently sought to determine whether he had the same affect before he was jailed.

The court sustained a relevance objection with the following remarks: "THE COURT: I don't think any of us are qualified to render that diagnosis. I don't think they taught us that in law school. So that may be your opinion, and I may remember him as being more alert at the time of the pleas, since I was there and you were not. [¶] MR. RODRIGUEZ: That is true, your Honor. [¶] THE COURT: And that's the real relevant time, is it not? [¶] MR. RODRIGUEZ: I would agree that that is the relevant time. [¶] THE COURT: So I will sustain the objection. Thank you."[28]

5. The Trial Court's Treatment of the Evidence

Even if there were substantial evidence that defendant entered an intelligent and voluntary plea, we would have grave doubts about the soundness of the ruling here because of the trial court's manifest reliance on supposed facts—some in evidence barely if at all—that have at best only the most attenuated connection to any issue before it. Most notably, the court seemed fixated upon the fact that defendant was not "mentally retarded" as defined by statute and other unidentified sources. The court communicated that view quite plainly before receiving any evidence, when it declared that in diagnosing mental retardation, "it isn't just intellectual functioning that's at issue. It's deficits of

[28] Counsel's original question sought to ascertain whether the *witness* observed any change in defendant's *apparent condition* from the time of his arrest to the time of the plea withdrawal hearing. The court could not know anything on that subject since it did not profess to have observed defendant before he changed his plea. The court then shifted the subject to whether defendant's condition had changed *since* the change of plea. On that point the court seemed to hold two equally erroneous, and mutually contradictory, beliefs. One was that no one was competent to testify about defendant's appearance and demeanor. The other was that if the court had already formed its own opinions on that subject, any other evidence on the point was irrelevant. Neither is sustainable. A lay witness may certainly testify about the affect of one with whom she is intimately acquainted. (See Evid. Code, § 800 [admissibility of lay opinion].) And a party is entitled to adduce relevant evidence, if only to make a record, even when the court appears to have already made up its mind about the issue to which the evidence relates.

adaptive behavior, and that's under the AAMR definition of mental retardation, and there has to be an instrument administered to determine whether there were deficits in adaptive behavior, and they have to have been manifested before the age of 18, and I don't see that as something that's present in this case." The court also took issue with Dr. Sanchez's conclusion that defendant was "functioning in the mentally retarded range of measured intelligence." In support of its view, however, the court merely recurred to the definition of mental retardation already noted. The court further responded to the quoted conclusion by commenting, "Moderate. What is this mild retardation, moderate? There are four categories of retardation. Which one is this? This is mild retardation, is it not? And if you look at the performance score, he's not mentally retarded, so he could be borderline." The court went on to say, "[T]his is just one test. And are there other tests that he's been given over the years . . . ."

When Dr. Sanchez testified, the court repeatedly questioned him on this point. The court quoted the relevant portion of Penal Code section 1376, subdivision (a), which defines mental retardation for purposes of eligibility for the death penalty; it requires " '[s]ignificantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior manifested before the age of 18.' " When Dr. Sanchez reiterated his opinion that defendant's level of intellectual functioning "fall[s] within the mental[ly] retarded range," the court elicited his affirmation of the highly compound question, "Functioning has to do with minor adaptive behavior, doesn't it? It is not with his intellectual capacity. If you are talking about his IQ score, you are talking of his intellectual capacity, not his adaptive reasoning. Is that correct?"

In other words, the court was anxious to establish that because of various gaps in the record, including the absence of evidence of adaptive deficits prior to age 18, defendant could not be diagnosed as mentally retarded. This point had no logical bearing whatever on the question before the court, which was whether defendant *actually*

understood what he was doing *when he entered his no-contest plea*. The court's reliance on technical definitions of mental retardation led it into at least two errors of reasoning. The first was to suppose that the *time of onset* of defendant's impaired functioning was somehow relevant, and apparently in the court's view *highly* relevant, to the merits of his plea-withdrawal motion. It was not. The question whether he manifested his condition in childhood was utterly divorced from any question properly before the court.

Similarly, the court seemed distracted by the fact, which it declared itself "dying" to establish, that however limited defendant's intellectual powers might be, he could not be found mentally retarded without deficits in "adaptive behavior."[29] (See Pen. Code, § 1376, subd. (a).) But as the phrase suggests, "adaptive behavior" is concerned with an individual's ability to *function* in relation with (adaptation to) his physical or social *environment*.[30] The presence or absence of such deficits in defendant's case was scarcely relevant to the question before the court, which was whether his *intellectual* impairments

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[29] "THE COURT: I'm dying to ask the next question. [¶] MR. RODRIGUEZ: Sure. [¶] THE COURT: It is possible, is it not, to have a deficit in intellectual functioning without—whether you're 18 or not—without the companion deficits in adaptive behavior? Is it not? [¶] THE WITNESS [Dr. Sanchez]: Yes. [¶] THE COURT: So you can still have subaverage intellectual functioning. I mean, I'm not talking about the very lowest ranges, but in that sort of borderline area, the 60's and 70's. You can, in fact, have borderline—or excuse me—you can have subaverage intellectual functioning and not have deficits in adaptive behavior? [¶] THE WITNESS: Yes. [¶] THE COURT: They are not necessarily accompanied by deficits and [*sic*; "in"] adaptive behavior; is that correct? [¶] THE WITNESS: Correct."

[30] "Adaptive Behavior includes the age-appropriate behaviors necessary for people to live independently and to function safely and appropriately in daily life. Adaptive behaviors include real life skills such as grooming, dressing, safety, safe food handling, school rules, ability to work, money management, cleaning, making friends, social skills, and personal responsibility." (About.com-Learning Disabilities <http://learningdisabilities.about.com /od/medicalinterventions/g/adptbehvrdeffin.htm> (as of Jun. 11, 2009.)

had prevented him from understanding the significance of entering a no-contest plea. This question was almost entirely concerned with his *cognitive* abilities, i.e., whether he *understood what he was doing* in connection with the forfeiture of constitutional rights and the trading of risks and benefits attendant upon that forfeiture. According to the undisputed evidence, he had *no* cognitive strengths, and his greatest weaknesses were on precisely the "comprehension" components of the test that Dr. Sanchez equated roughly to "common sense[,] reasoning" and "social judgment." "Adaptive" deficits, in contrast, were at best only tenuously pertinent.

The court seemed to betray a similar misapprehension when it attempted to elicit testimony from Dr. Sanchez that defendant's "performance" score, which was somewhat higher than his "comprehension" score, reflected an "ability to understand concepts." But Dr. Sanchez testified to the contrary: the performance score corresponded approximately to "right cerebral functioning . . . nonverbal problem skills. Usually, your vision and perception motor skills." These aptitudes may have borne directly on defendant's ability to do his job, but they had minimal bearing on his ability to comprehend a criminal plea. At the same time, Dr. Sanchez testified, defendant showed distinct weaknesses in areas that appear highly relevant to that ability, including "immediate auditory recollection," which is the ability to remember what has just been said and "reality awareness," which is "comprehension, common sense, reasoning, things like that." Dr. Sanchez acknowledged that these areas of weakness were the "[s]ame thing" as "[j]udgment in practical situations."

These were not subjects on which the court was entitled to make findings that would be shielded by a deferential standard of review. There was, simply stated, *no evidence* that any of the subjects into which the court inquired had any bearing on the questions before it. The only competent psychological evidence in this record was the report and testimony of Dr. Sanchez, who did what he could to disabuse the court of the

misapprehensions under which it seemed to be laboring. We of course are no more entitled to make findings outside the record than the trial court was. But the court's approach to the case plainly betrays heavy reliance on a set of factual premises that were at best entirely unsupported by the record.

In sum, the transcript of the plea-taking left serious doubts about the voluntary and intelligent character of defendant's plea. Far from dispelling those doubts, the evidence at the plea-withdrawal hearing greatly magnified them. Apart from defendant's naked affirmations at the plea-taking—compromised, as we have noted, by various other circumstances—there is *no evidence* in this record that defendant in fact understood what he was doing, or more importantly what he was giving up, when he entered his guilty plea. It follows that the judgment based on that plea must be reversed.

This conclusion renders moot defendant's claim that the trial court erred under *Cunningham v. California* (2007) 549 U.S. 270, in imposing the upper terms on three of the four counts.

DISPOSITION

The judgment is reversed for further proceedings on defendant's motion to withdraw his plea.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.